No. 82-491

Office-Supreme Court, U.S.
FILED
OCT 28 1982
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA,
Petitioner

v.

RSR CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

James W. Hightower
HIGHTOWER, ALEXANDER, COOK AND BIRNBAUM, P.C.
5801 Marvin D. Love Freeway,
Suite 301
Dallas, Texas 75237-2385
(214) 339-4108

COUNSEL FOR:
RSR CORPORATION, *Respondent*

QUESTION PRESENTED

Whether Congress changed the application of certain criminal penalty provisions for violation of Federal Motor Safety Regulations by private motor carriers when it recodified the Interstate Commerce Act.

TABLE OF CONTENTS

	PAGE
Opinion below	1
Jurisdiction	1
Statutory provisions involved	2
Statement	7
Reasons why the writ should be denied	8
Conclusion	12
Appendix A	1a

TABLE OF AUTHORITIES

Cases:

Mossew v. *United States*, 266 F. 18 (2d Cir. 1920) 10

United States v. *Cardiff*, 344 U.S. 174 ..... 11, 12

United States v. *Rossetti Brothers*, 671 F.2d 718 10

Statutes and regulations:

Department of Transportation Act, Pub. L. No. 89-670, 80 Stat. 931 (codified at 49 U.S.C. 1651 *et seq.*) 9

49 U.S.C. 1655(e)(6)(C) 5, 9

49 U.S.C. 1655(f)(2)(A) 5, 9

49 U.S.C. 1655(f)(2)(B) 5

Section 204(a)(3)—Interstate Commerce Act 2

Subtitle IV, Title 49—Transportation (Pub. L. 95-473, 92 Stat. 1337) 4, 8, 9, 10, 12

Pub. L. No. 95-473, 92 Stat. 1337 ..... 3, 8, 9

Pub. L. No. 95-473, 92 Stat. 1466:

Section 3 6

Section 3(a) 9

Section 3(c) 9

Pub. L. No. 96-296 10

Pub. L. No. 96-454 10

Pub. L. No. 97-253 10

Pub. L. No. 97-261 10

PAGE

49 U.S.C. 304 8

49 U.S.C. 304(a)(3) 2, 8, 9, 10

49 U.S.C. 322(a) 10

49 U.S.C. 322(g) 3, 4, 8, 10

49 U.S.C. 10521 2

49 U.S.C. 10524 ..... 3, 8

49 U.S.C. 11909(b) 4, 7, 8, 9, 10, 11

49 U.S.C. 11914(b) 10

49 C.F.R. 395.3(a) 10

49 C.F.R. 395.3(b) 10

49 C.F.R. 395.8 ..... 8, 11

Miscellaneous:

H.R. 6993, 97th Cong., 2d Sess (1982) 10

In the Supreme Court of the United States

OCTOBER TERM, 1982

No. 82-491

UNITED STATES OF AMERICA,
Petitioner

v.

RSR CORPORATION,
Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

Respondent, RSR Corporation, respectfully requests that this Court deny the Petition for a Writ of Certiorari, seeking review of the Fifth Circuit's opinion in this case. The opinion is reported at 664 F.2d 1249.

OPINION BELOW

The opinion of the Court of Appeals is attached hereto as Appendix A, infra, la-14a.

JURISDICTION

Respondent accepts the jurisdictional statement of the Petitioner.

STATUTORY PROVISIONS INVOLVED

1. Section 204(a)(3) of the Interstate Commerce Act, 49 U.S.C. 304(a)(3) provides:

> (a) It shall be the duty of the (Interstate Commerce Commission—
>
> > (3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of Subsection (c) of this section and Sections 305, 320, 321, 322(a), (b), (d), (f), and (g), and 324 of this title.

2. 49 U.S.C. 10521, Subchapter II of Chapter 105 provides:

> (a) Subject to this chapter and other law, the Interstate Commerce Commission has jurisdiction over transportation by motor carrier and the procurement of that transportation to the extent that passengers, property, or both, are transported by motor carrier—
>
> > (1) Between a place in—
> >
> > > (A) A State and a place in other States;
> >
> > > (B) A State and another place in the same State through another State;
> >
> > > (C) The United States and a place in a territory or possession of the United States to the extent the transportation is in the United States;

(D) The United States and another place in the United States through a foreign country to the extent the transportation is in the United States; or

(E) The United States and a place in a foreign country to the extent the transportation is in the United States; and

(2) In a reservation under the exclusive jurisdiction of the United States or on a public highway.

3. 49 U.S.C. 10524, Subchapter II of Chapter 105 provides:

(a) The Interstate Commerce Commission does not have jurisdiction under this subchapter over the transportation of property by motor vehicle when—

(1) The property is transported by a person engaged in a business other than transportation and

(2) The transportation is within the scope of, and furthers a primary business (other than transportation) of the person.

4. 49 U.S.C. 322(g) (Repealed by Pub. L. 95-473, Oct. 17, 1978, 92 Stat. 1337) provided:

(a) Any motor carrier, broker, or other person, or any officer, agent, employee, or representative thereof, who shall willfully fail or refuse to make a report to the Commission as required by this part, or to make specific and full, true, and correct answer to any question within thirty days from the time it is lawfully required by the Commission so to do, or to keep accounts, records, and memoranda in the form and manner prescribed by the Commission, or shall knowingly and willfully falsify, destroy, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willingly file with

the Commission any false report, account record, or memorandum, or shall knowingly and willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, or person required under this part to keep the same, or shall knowingly and willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or orders of the Commission with respect thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof be subject for each offense to a fine of not more than $5,000. As used in this subsection, the words, "keep" and "kept" shall be construed to mean made, prepared, or compiled, as well as retained.

5. Subtitle IV, Title 49—Transportation, Section 11909(b) (Source 49 U.S.C. 322(g)), provides:

(a) A person required to make a report to the Commission, answer a question, or make, prepare, or preserve a record under this subtitle about transportation subject to the jurisdiction of the Commission under Subchapter II of Chapter 105 of this title, or an officer, agent, or employee of that person, that (1) willfully does not make that report, (2) willfully does not specifically, completely, and truthfully answer that question within 30 days from the date the Commission requires the question to be answered, (3) willfully does not make, prepare, or preserve that record in the form and manner prescribed by the Commission, (4) knowingly and willingly falsifies, destroys, mutilates, or changes that report or record, (5) knowingly and willfully files a false report or record with the Commission, (6) knowingly and willfully makes a false or incomplete entry in that record about a business related fact or transaction, or (7) knowingly and willingly makes, prepares, or preserves a record in violation of a regulation or order of the Commission, shall be fined not more than $5,000.

6. 49 U.S.C. 1655(e)(6)(C) of the Department of Transportation Act provides:

> (e) There are hereby transferred to and vested in the Secretary (of Transportation) all function, powers, and duties of the Interstate Commerce Commission, and of the Chairman, members, officers, and offices thereof, under—
>
> • • • • • • •
>
> (6) the following provisions of the Interstate Commerce Act, as amended—
>
> • • • • • • •
>
> (C) relating generally to qualifications and maximum hours of service of employees and safety of operation and equipment: Sections 204(a)(1) and (2), to the extent that they relate to qualifications and maximum hours of service of employees and safety of operation and equipment; and sections 204(a)(3), 3(a), and (5) (49 U.S.C. 304).

7. 49 U.S.C. 1655(f)(2)(A) and (B) provides:

> (2)(A) With respect to any function which is transferred to the Secretary (of Transportation) by Subsection (e) and which was vested in the Interstate Commerce Commission preceding such transfer, the Secretary shall have the same administrative powers under the Interstate Commerce Act as the Commission had before such transfer with respect to such transferred function. After such transfer, the Commission may exercise its administrative powers under the Interstate Commerce Act only with respect to those of its functions not transferred by Subsection (e).
>
> (2)(B) For purposes of this paragraph—
>
> (i) the term "function" includes power and duty, and

(ii) the term "administrative powers under the Interstate Commerce Act" means any functions under the following provisions of the Interstate Commerce Act, as amended: * * * Section ( ) * * * 222 (except Subsections (b)(2) and (b)(3) thereof) * * *.

8. Section 3 of the Interstate Commerce Act, entitled "Legislative Purpose and Construction," provides in pertinent part (Pub. L. No. 95-473, 92 Stat. 1466):

(a) Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced. Laws enacted after May 15, 1978, that are inconsistent with this Act are considered as superceding it to the extent of the inconsistency.

(b) A reference to a law replaced by Sections 1 and 2 of this Act, including a reference in the regulation, order or other law, is deemed to refer to the corresponding provision enacted by this Act.

(c) An order, rule, or regulation in effect under a law replaced by Sections 1 and 2 of this Act continues in effect under the corresponding provision enacted by this Act until repealed, amended, or superseded.

(d) An action taken or an offense committed under a law replaced by Sections 1 and 2 of this Act is deemed to have been taken or committed under the corresponding provision enacted by this Act.

(e) An inference of a legislative construction is not to be drawn by reason of the location in the United States Code of a provision enacted by this Act or by reason of the caption or catchline thereof.

(f) If a provision enacted by this Act is held invalid, all invalid provisions that are severable from the invalid provision remain in effect. If a provision of this Act is held invalid in any of its applications, the provision remains valid for all valid applications that are severable from any of the invalid applications.

STATEMENT

RSR Corporation (RSR) accepts the statement of the case as stated in the Court of Appeals opinion as being the correct statement of this case.

The government's statement is not completely accurate. The government's statement goes outside the record, makes conclusions, and attempts to inject prejudice in the case in order to influence this Court into granting the Petition for Writ of Certiorari. The government's statement is inaccurate or outside the record as follows:

1. There is nothing in the record to indicate the number of private motor carriers subject to the jurisdiction of the Department of Transportation (DOT).

2. The testimony regarding previous violations was that there were such violations in 1968 and 1972 and that none of the violations concerned false driver's daily log books. Further, there was an eight year period lapse in which period no violations were shown. (Tr. 47, 48)

3. The sentence regarding hundreds of violations of the motor carrier safety regulations was nothing but heresay. The Assistant United States Attorney stated himself that the comments that he was making to the Court were based on what some other party had told him. (Tr. 46)

4. Note 2 on Page 5 of the Petition makes the statement that 49 U.S.C. 11909(b) imposes criminal penalties for willfully maintaining false records, including

records required by 49 C.F.R. 395.8, which, when it is referring to private motor carriers, is nothing more than a conclusion on the government's part and in direct opposition to the holding of the Court of Appeals, Fifth Circuit. By the express terms of 49 U.S.C. 11909(b) private carriers are not included under that section.

5. The second paragraph on Page 6 of the Petition which begins with "The Court reached. . . ." fails to note that the Court of Appeals' complete statement is "that the information would have been proper if RSR had been charged with a violation of 49 U.S.C. Section 322(g) and if that statute was still in effect.". However, the only vehicle to Section 322(g) was through Section 304(a)(3).

REASONS WHY THE WRIT SHOULD BE DENIED

The Supreme Court should deny this Petition for a Writ of Certiorari because the Court of appeals, in a very well written and well reasoned opinion, correctly held that "due to the 1978 recodification of the Interstate Commerce Act, criminal penalties for violations of 49 C.F.R. Section 395.8 no longer applies to private motor carriers.".

RSR was convicted of violating 49 C.F.R. Section 395.8 and subjected to criminal penalties under 49 U.S.C. Section 11909(b). Section 395.8 was issued by the Department of Transportation (DOT) under the authority of 49 U.S.C. Section 304. Section 11909(b) is part of Subtitle IV of Title 49, U.S.C. "Transportation" (Pub. L. 95-473, 92 Stat. 1337, Act of Oct. 17, 1978, hereinafter referred to as "Recodification Act"). RSR as a private motor carrier is not subject to the jurisdiction of the Interstate Commerce Commission under Subchapter II of Chapter 105 of Subtitle IV of Title 49, U.S.C., "Transportation". 49 U.S.C. Section 10524. Prior to the enactment of the DOT Act on October 15, 1966, the only statute which would

have given the Interstate Commerce Commission authority over private carriers was contained in Section 304(a)(3) and which authority was transferred from the Interstate Commerce Commission to the DOT pursuant to Section 1655(e)(6)(C). After the passage of the DOT Act, regulation of private motor carriers was no longer under the jurisdiction of the ICC. 49 U.S.C. Section 1655(f)(2)(A). As explained by the Court of Appeals, the penalty provisions pertaining to private motor carriers is obtained through Section 304(a)(3), which was not repealed or replaced by the "Recodification Act".

The main thrust of the government's argument in its Petition for a Writ of Certiorari is that the Interstate Commerce Act was recodified "without substantive change". The government is asking this Court to hold that Section 11909(b) subjects private motor carriers to penalties under that section even though the plain language of Section 11909(b) indicates that the conduct of private carriers is not subject to penal sanctions. The government basis its argument on Section 3(a) of the "Recodification Act" entitled "Legislative Purpose and Construction," which states that "Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced herein." The government further states that Section 3(c) provides that "An order, rule or regulation in effect under a law replaced by Sections 1 and 2 of this Act continues in effect under the corresponding provision enacted by this Act until repealed, amended, or superseded."

The Court of Appeals poignantly pointed out that jurisdiction of private motor carriers, as pertinent herein, is obtained through Section 304(a)(3) which was not recodified under Subtitle IV of Title 49 United States Code, "Transportation". Therefore, Section 3(a) of the "Recodification Act" has no application to Section 304(a)(3), because it wasn't changed,

amended or replaced by the "Recodification Act". The Court of Appeals' analysis of Section 304(a)(3) as it relates to Section 322(g) and Section 11909(b) is well reasoned and adopted by the Respondent. Reference is hereby made to the Court of Appeals' opinion as shown in Appendix A, infra, la-14a. Therefore, since there is no penalty, there is no crime. *Mossew* v. *United States,* 266 F. 18 (2d Cir. 1920).

The Second Circuit in *United States* v. *Rossetti Bros.,* 671 Fed. 2d 718 (2d Cir., 2/3/82), which was decided subsequent to this case, failed to recognize that 49 C.F.R. 395.3(a) and (b) was promulgated by the DOT and not the Interstate Commerce Commission. In fact, the Second Circuit on Page 720 states the following: "No statute other than Section 11914(b) even arguably defines the punishment for their violation." i.e. violation of 49 C.F.R. Section 395.3(a)(b). It is believed that if the Second Circuit had been appraised of the two different Acts, i.e. the Department of Transportation Act and Interstate Commerce Act, that the Court would have arrived at a different decision which would have been in conformance with the decision of the Court of Appeals for the Fifth Circuit. It is further submitted to the Court that the opinion of the Court of Appeals, Fifth Circuit, is the better reasoned opinion.

Congress passed the "Recodification Act" effective October 17, 1978. Since that time Congress has amended Subtitle IV—Interstate Commerce, 49 United States Code, "Transportation" by Pub. L. 96-296 effective 7-1-80; Pub. L. 96-454 effective 10-15-80; by the Bus Regulatory Reform Act of 1982, Pub. L. 97-261 and by H.R. 6955, the Omnibus Budget Reconciliation Act of 1982 (Pub. L. 97-253). As the government points out, a bill has been introduced in Congress, known as H.R. 6993, 97th Congress, 2d Sess., Sections 6,522 (1982), which will address the concerns of the Court of Appeals in this matter. This is a further reason why the Supreme Court should not grant the Petition for a Writ of Certiorari. The Court will

notice that Congress has not been overly concerned with the fact that it has failed to include a penalty for the violation of 49 C.F.R. 395.8 by private motor carriers.

The opinion of the Court of Appeals in this case is correct and there is no important policy reason why this Court should concern itself in this case by granting the Petition for a Writ of Certiorari. Congress can correct this matter if it deems that it is necessary to correct the same.

The part of the Court of Appeals' opinion regarding the construction of Section 11909(b) is correct. In addition to the authorities cited in the Court of Appeals' opinion, I would call this Court's attention to its opinion in *United States* v. *Cardiff*, 344 U.S. 174 wherein this Court stated on Page 190 the following:

> "However we read Section 301(f) we think it is not fair warning, cf. *United States* v. *Weitzel*, 246 U.S. 533, 39 S.Ct. 381, 62 L.Ed. 872; *McBoyle* v. *United States*, 283 U.S. 25, 51 S.Ct. 340, 75 L.Ed. 816, to the factory manager that if he fails to give consent, he is a criminal. The vice of vagueness in criminal statutes is the treachery they conceal either in determining what persons are included or what acts are prohibited. Words which are vague and fluid, cf. *United States* v. *L. Cohen Grocery Co.*, 255 U.S. 81, 41 S.Ct. 298, 65 L.Ed. 516, may be as much of a trap for the innocent as the ancient laws of Caligula."

In this case, Section 11909(b) indicates on its face that it only applies to persons who are subject to the jurisdiction of the Commission under Subchapter II of Chapter 105 of 49 U.S.C., "Transportation". A motor private carrier is not subject to the Commission under Subchapter II of Chapter 105. A person reading all of the penalty statutes would find that they only apply to persons or carriers that are subject to the jurisdiction of the Interstate Commerce Commission, i.e., a rail carrier, common or contract carrier, water carrier or freight forwarder. Since a private motor carrier is not subject to the jurisdiction of

the Interstate Commerce Commission in any way, the reading of the statutes would not inform a motor private carrier that it could be penalized under any of these civil and criminal penalties in Chapter 119 of 49 U.S.C., "Transportation". This Court's opinion in *United States* v. *Cardiff*, supra, supports the holding of the Court of Appeals, Fifth Circuit in this case.

CONCLUSION

The Supreme Court should Jeny the Petition for a Writ of Certiorari.

Respectfully submitted,

HIGHTOWER, ALEXANDER, COOK AND BIRNBAUM, P.C.

By _____
James W. Hightower
Suite 301 Allied Bank—
Southwest Bldg.
5801 Marvin D. Love Freeway
Dallas, Texas 75237-2385
(214) 339-4108

APPENDIX A

UNITED STATES OF AMERICA,
Plaintiff-Appellee

v.

RSR CORPORATION,
Defendant-Appellant

No. 70-1782

United States Court of Appeals,
Fifth Circuit*
Unit A

January 4, 1982

Appeal from the United States District Court for the Northern District of Texas.

Before RUBIN, RANDALL and TATE, Circuit Judges.

Per CURIAM:

This case presents the issue of whether Congress inadvertently changed the application of certain criminal penalty provisions for violation of federal motor safety regulations when it recently recodified the Interstate Commerce Act. We conclude that Congress has done so.

The primary business of defendant RSR Corporation is the recycling of salvaged batteries and the selling of lead taken from these batteries. RSR operates a large fleet of trucks in the course of its business. These trucks are not for hire, and they are used to transport RSR's property across state lines. On April 21, 1980 the government filed an information containing eight counts against RSR charging a criminal violation of the

* Former Fifth Circuit case, Section 9(1) of Public Law 96-452—October 14, 1980.

Federal Motor Carriers Safety Regulations. Specifically, the government charged that RSR had maintained false daily driver logs in violation of 49 C.F.R. 395.8.[1] It claimed that a violation of these regulations subjected RSR to criminal penalties under 49 U.S.C. Section 11909(b), which imposes fines for willful falsification of such records. RSR moved to dismiss the counts of the information on the grounds that it was a private motor carrier and that Section 11909(b), did not apply criminal penalties to private carriers. The trial court denied RSR's motion on June 16, 1980. On June 23, 1980, RSR entered a plea of guilty to counts 1, 3, 5, 7, and 8 of the information. The other counts were dismissed. RSR now appeals from the denial of its motion to dismiss the entire information. We reverse.

Our view, simply stated, is that due to the 1978 recodification of the Interstate Commerce Act, criminal penalties for violations of 49 C.F.R. Section 395.8 no longer apply to private motor carriers.[2] The language of the present penalty provision, 49 U.S.C. Section 11909(b), compels this result, even though the corresponding pre-recodification provision, 49 U.S.C. Section 322(g), would have permitted penal sanctions against private carriers. To understand why this is so, a discussion of the history of the relevant statutory provisions of the Interstate Commerce Act is necessary.

---

[1] 49 C.F.R. Section 395.8 (1980) provides, in pertinent part:

Section 395.8 *Driver's daily log.*

(a) Except as provided in Section 395.8 and paragraph (t) of this section, every motor carrier shall require that a driver's daily log, form MCS-59, shall be made in duplicate by every driver used by the carrier and every driver who operates a motor vehicle shall make such a log. Failure to make logs, failure to make required entries therein, falsification of entries, or failure to preserve logs shall make both the driver and the carrier liable to prosecution . . .

[2] The government has not contested for purposes of this appeal that RSR is a private motor carrier within the meaning of the Interstate Commerce Act. See 49 U.S.C. Section 10102(14).

Statutory History

Congress enacted Part II of the Interstate Commerce Act on August 9, 1935. Pub. L. No. 72-225, 49 Stat. 543 (originally codified at 49 U.S.C. Sections 301-327; presently codified in scattered sections of 49 U.S.C.). The new additions to the Interstate Commerce Act empowered the Interstate Commerce Commission to regulate various aspects of transportation of property by motor carriers engaged in interstate commerce, depending upon whether the carrier was classified as a common, contract, or private carrier. Section 204(a)(3) of the new Act, as codified in 49 U.S.C. Section 304(a)(3), gave the ICC powers to promulgate regulations governing the safety of operations of private motor carriers:

> (a) It shall be the duty of the Commission—
>
> . . .
>
> (3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of subsection (c) of this section and sections 305, 320, 321, 322(a), (b), (d), (f) and (g), and 324 of this title.

At issue in this case are a set of regulations issued under authority of 49 U.S.C. Section 304(a)(3) describing requirements for keeping and maintaining accurate daily driver logbooks. 49 C.F.R. Section 395.8.

The penalty provisions for failure to comply with these regulations were originally contained in 49 U.S.C. Section 322(g) (current version at 49 U.S.C. Section 11909(b)):

> Any *motor carrier,* broker, or other person, or any officer, agent, employee, or representative thereof, who shall willfully fail or refuse to make a report to the Commission *as required by this chapter,* or to make specific and full, true, and correct answer to any question within thirty days from the time it is lawfully required by the Commission so to do, or to keep accounts, records, and memoranda in the form and manner prescribed by the Commission, or shall knowingly and willfully falsify, destroy, mutilate, or alter any such report, account, record, or memorandum, or shall knowingly and willfully file with the Commission any false report, account, record or memorandum, or shall knowingly and willfully neglect or fail to make full, true, and correct entries in such accounts, records, or memoranda of all facts and transactions appertaining to the business of the carrier, or person required under this chapter to keep the same, or shall knowingly and willfully keep any accounts, records, or memoranda contrary to the rules, regulations, or orders of the Commission with respect thereto, shall be deemed guilty of a misdemeanor and upon conviction thereof be subject to each offense to a fine of not more than $5,000. As used in this subsection the words "keep" and "kept" shall be construed to mean made, prepared, or compiled, as well as retained. (emphasis added).

These penalty provisions applied to private motor carriers because of Section 304(a)(3), which specifically mentions Section 322(g) as a provision where the definition of "motor carrier" includes private carriers.

On October 15, 1966, Congress created the Department of Transportation by means of Pub. L. No. 89-670, 80 Stat. 931 (codified at 49 U.S.C. Sections 1651 et seq.) (hereinafter referred to as the "Department of Transportation Act"). Con-

gress transferred the ICC's authority to regulate private motor carriers under Section 304(a)(3) to the DOT. 49 U.S.C. Section 1655(e)(6)(C) provided that:

> (e) There are hereby transferred to and vested in the Secretary (of Transportation) all functions, powers, and duties of the Interstate Commerce Commission, and of the Chairman, members, officers, and offices thereof, under—
>
> . . . . . .
>
> (6) the following provisions of the Interstate Commerce Act as amended—
>
> (C) relating generally to qualifications and maximum hours of service of employees and safety of operation and equipment: Sections 204(a)(1) and (2), to the extent that they relate to qualifications and maximum hours of service employees and safety of operation and equipment; and sections 204(a)(3), (3a), and (5) (49 U.S.C. 304).

49 U.S.C. Section 1655 (f) gave the DOT several functions and administrative powers formerly held by the ICC, including those under Section 322(g):

> . . .
>
> (2)(A) With respect to any function which is transferred to the Secretary by subsection (e) and which was vested in the Interstate Commerce Commission preceding such transfer, the Secretary shall have the same administrative powers under the Interstate Commerce Act as the Commission had before such transfer with respect to such transferred function. After such transfer, the Commission may exercise its administrative powers under the Interstate Commerce Act only with respect to those of its functions not transferred by subsection (3).
>
> (B) For purposes of this paragraph—
>
> (i) the term "function" includes power and duty, and

> (ii) the term "administrative powers under the Interstate Commerce Act" means any functions under the following provisions of the Interstate Commerce Act, as amended: . . . section ( ) . . . 222 (codified as 49 U.S.C. Section 322) (except subsections (b) (2) and (b)(3) thereof) . . .

After the passage of the Department of Transportation Act, regulation of private motor carriers was no longer under the jurisdiction of the ICC. 49 U.S.C. Section 1655(f)(2)(A).

On October 17, 1978, in a laudatory effort to recodify parts of the Interstate Commerce Act, Congress enacted Pub. L. No. 93-473, 92 Stat. 1337 (codified at 49 U.S.C. Sections 10101-11916) (hereinafter referred to as the "Recodification Act"). It is undisputed that through this recodification, Congress intended no substantive change in the Interstate Commerce Act and related laws. See H.R. Rep. No. 95-1395, 95th Cong., 1st Sess. 4, 9-10 (1978), *reprinted in* (1978) U.S. Code Cong. & Ad. News 3009, 3012-13, 3018. The purpose of the recodification was merely to simplify language, replace obsolete terms, and eliminate superseded and obsolete material.[3]

---

[3] The legislative history is echoed in the words of the Recodification Act itself. Section 3 of the Act, entitled "Legislative Purpose and Construction," stated that:

> (a) Sections 1 and 2 of this Act restate, without substantive change, laws enacted before May 16, 1978, that were replaced by those sections. Those sections may not be construed as making a substantive change in the laws replaced. Laws enacted after May 15, 1978, that are inconsistent with this act are considered as superseding it to the extent of the inconsistency.
>
> (b) A reference to a law replaced by sections 1 and 2 of this Act, including a reference in the regulation, order or other law, is deemed to refer to the corresponding provision enacted by this Act.
>
> (c) An order, rule, or regulation in effect under a law replaced by sections 1 and 2 of this Act continues in effect under the corresponding provision enacted by this Act until repealed, amended, or superseded.

(footnote continued on following page)

Nevertheless, the provision enacted by Congress to replace 49 U.S.C. Section 322(g), 49 U.S.C. 11909(b), differs significantly from the former provision in its language:

> A person required to make a report to the Commission, answer a question, or make, prepare, or preserve a record under this subtitle *about transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title,* or an officer, agent, or employee of that person, that (1) willfully does not make that report, (2) willfully does not specifically, completely, and truthfully answer that question in 30 days from the date the Commission requires the question to be answered, (3) willfully does not make, prepare, or preserve that record in the form and manner prescribed by the Commission, (4) knowingly and willfully falsifies, destroys, mutilates, or changes that report or record, (5) knowingly and willfully files a false report or record with the Commission, (6) knowingly and willfully makes a false or incomplete entry in that record about a business related fact or transaction, or (7) knowingly and willfully makes, prepares, or preserves a record in violation of a regulation or order of the Commission, shall be fined not more than $5,000.

(emphasis added)

(footnote continued from previous page)

> (d) An action taken or an offense committed under a law replaced by sections 1 and 2 of this Act is deemed to have been taken or committed under the corresponding provision enacted by this Act.
>
> (e) An inference of a legislative construction is not to be drawn by reason of the location in the United States Code of a provision enacted by this Act or by reason of the caption or catchline thereof.
>
> (f) If a provision enacted by this Act is held invalid, all invalid provisions that are severable from the invalid provision remain in effect. If a provision of this Act is held invalid in any of its applications, the provision remains valid for all valid applications that are severable from any of the invalid applications.
>
> Publ. L. 94-453, Oct. 17, 1978, 92 Stat. 1466.

By its terms 49 U.S.C. Section 11909(b) does not apply to private motor carriers, since these are not within the jurisdiction of the ICC due to the 1966 Department of Transportation Act.[4] Hence, argues RSR, the penalty provisions of Section 11909(b) do not apply to it and the government's information against RSR under Section 11909(b) should have been dismissed.

The parties do not dispute that the information would have been proper if RSR had been charged with a violation of 49 U.S.C. Section 322(g) and if that statute were still in effect. However, the government concedes that Section 322(g) has been repealed by the Recodification Act because it has been replaced by Section 11909(b). The Act requires that any reference to a former statute be deemed a reference to its replacement. Thus, under the Department of Transportation Act, 49 U.S.C. Section 1655, the DOT has the power to promulgate regulations for private carriers under Section 304(a)(3), for that section has not yet been recodified and remains in force. However the DOT's former authority under the penalty provisions of Section 322(g) must now be read as based instead upon Section 11909(b), and Section 11909(b) only authorizes penalties with respect to transportation subject to the ICC's juridication. It is undisputed that at the time when this replacement statute was enacted, the ICC had no jurisdiction over private motor carriers, nor does it have that jurisdiction presently. Thus, although the DOT retains its power to

---

[4] Subchapter II of chapter 105 of the Interstate Commerce Act (now codified at 49 U.S.C. Sections 10521-10529) exempts private carriers from the ICC's jurisdiction. 40 U.S.C. Section 10521 states that the ICC has jurisdiction over "transportation by motor carrier." 49 U.S.C. Section 10102(14) defines a "motor private carrier" as a person "other than a motor carrier."

Before the passage of the Department of Transportation Act, Section 304(a)(3) included private carriers in the definition of "motor carriers" under the ICC's jurisdiction for certain limited purposes. The Department of Transportation Act transferred the ICC's powers under Section 304(a)(3) to the DOT. 49 U.S.C. Section 1655(e)(6)(C). From that point on the ICC no longer had jurisdiction over private carriers.

issue regulations for private motor carriers, RSR argues that a congressional oversight has robbed these regulations of any enforcement through penal sactions.

The government responds that the original Section 322(g) by its terms did not apply to private carriers either, but only did so through reference to §304(a)(3). Thus the fact that Section 304(a)(3) remains in force allows Section 11909(b) to apply to private carriers.

This argument is tempting but it does not prove the governments's desired conclusion. If we substitute the new statute for the old in Section 304(a)(3) as required by the Recodification Act, we obtain the following:

> (a) It shall be the duty of the Commission—
>
> . . .
>
> (3) To establish for private carriers of property by motor vehicle, if need therefor is found, reasonable requirements to promote safety of operation, and to that end prescribe qualifications and maximum hours of service of employees, and standards of equipment. In the event such requirements are established, the term "motor carrier" shall be construed to include private carriers of property by motor vehicle in the administration of subsection (c) of this section and section ( ) . . . (11909(b) . . . of this title.

However, the term "motor carrier," which was the operative term expanding the scope of Section 322(g) to encompass private motor carriers, does not appear at all in Section 11909(b). Section 322(g) applied to "(a)ny motor carrier . . . who shall willfully fail or refuse to make a report to the Commission as required by this chapter . . ." Thus, read in conjunction with Section 304(a)(3), it is clear that Section 322(g) would apply to private carriers to the extent that the ICC (or later, the DOT) issued regulations authorized by Section 304(a)(3). On the other hand, Section 11909(b) does

not refer to "motor carriers" as defined in Section 304(a)(3); rather, its scope is limited to "person(s) required to make a report to the Commission . . . about transportation subject to the jurisdiction of the Commission under subchapter II of chapter 105 of this title." The ICC, however, has had no jurisdiction over private carriers since 1966. Its powers under Section 304(a)(3), which might have given it jurisdiction, have been transferred to the Department of Transportation. Hence Section 304(a)(3) cannot help the government get around the clear language of Section 11909(b).

To this it may be objected that what Congress clearly meant to say in Section 11909(b) was "subject to the jurisdiction of the Commission prior to the Department of Transportation Act." We then would look to Section 304(a)(3) to see what the jurisdiction of the ICC was before 1966 and, finding that it included private motor carriers, all would be well. The problem is that although this is what Congress clearly meant to say, intended to say, and wanted to say, still Congress did not say it. It said something which, on its face, appears very different: we are instructed instead to look to the present jurisdiction of the ICC, which does not govern private carriers.

The government poses a second argument, based upon the Department of Transportation Act itself. If we substitute the new statute for the old in Sections 1655(f)(2)(A) and (B) we obtain:

> (2)(A) With respect to any function which is transferred to the Secretary by subsection (e) and which was vested in the Interstate Commerce Commission preceding such transfer, the Secretary shall have the same administrative powers under the Interstate Commerce Act *as the Commission had before such transfer* with respect to such transferred function. After such transfer, the Commission may exercise its administrative powers under the Interstate Commerce Act only with respect to those of its functions not transferred by subsection (e).

(B) For purposes of this paragraph—

(i) the term "function" includes power and duty, and

(ii) the term "administrative powers under the Interstate Commerce Act" means any functions under the following provisions of the Interstate Commerce Act, as amended: ... section ( ) ... Section 11909(b). (emphasis added)

The government's argument then goes as follows: Section 1655(e)(6)(C) transferred the ICC's functions under Section 304(a)(3) to the DOT. These functions are what give enforcement power to the provisions of the former Section 322(g) and the present Section 11909(b). According to Section 1655(f) then, with respect to powers under Section 304(a)(3), the Secretary of the DOT now has the same administrative powers under Section 11909(b) as the ICC had before the transfer. Before the transfer, the ICC had regulatory powers over private carriers under Section 304(a)(3). It thus had jurisdiction over this sort of transportation. Thus the penalty provisions of Section 11909(b) would apply to private carriers before the transfer. Hence the powers of enforcement under Section 11909(b) over private carriers remain unchanged after the transfer to the DOT, and the DOT may impose regulations on private carriers enforced by penalties under Section 11909(b).

The problem with this argument is that it depends upon an inquiry into what the ICC's powers under Section 11909(b) were before the 1966 transfer. This is especially puzzling, given that Section 11909(b) was not enacted until 1978.

The government may be arguing that the inquiry required by Section 1655 should be what the ICC's powers *would have been* if Section 11909(b) were in effect in 1966. But this is a strained construction of the statute and is not implied by its

language. Neither Section 11909(b) nor the Department of Transportation Act indicates why changes in the Interstate Commerce Act *subsequent* to the transfer should affect or relate back to an inquiry into what the ICC's powers were *prior* to the transfer. In reality, this argument suffers from the same problem as the first one: Congress should have made clear in the language of the statute what it meant, and it has not done so.

We are thus faced with a situation in which the language of Section 11909(b) on its face removes private carriers from its penalty provisions. The government argues that, sympathetically construed, the statute need not be so read. But we think it improper to stretch the language of the statute to that extent. We are especially mindful of the fact that we are dealing with a penal statute, and such statutes should be strictly construed.

Strict Construction

"The rule that penal laws are to be construed strictly, is perhaps not much less old than construction itself." *United States* v. *Wiltberger,* 5 Wheat. 76, 5 L.Ed. 37 (1820). Like all maxims of construction, its decisional force varies according to the facts and circumstances of each case and the maxim must be balanced against such countermaxims as construction according to the intent of the legislature and construction according to a reasonable reading of plain language. For example, it is often said that although penal statutes are to be strictly construed, they are not to be construed so strictly as to defeat the obvious intention of the legislature. *Barrett* v. *U.S.,* 212, 96 S.Ct. 298, 46 L.Ed.2d 450 (1976); *Huddleston* v. *U.S.,* 415 U.S. 814, 94 S.Ct. 1262, 39 L.Ed.2d 782 (1974); *United States* v. *Bramblett,* 348 U.S. 503, 75 S.Ct. 504, 99 L.Ed. 594 (1955); *American Fur Co.* v. *United States,* 2 Pet. 358, 7 L.Ed. 450 (1829); *United States* v. *Wiltberger,* supra; *United States* v. *Scrimgeour,* 636 F.2d 1019 (5th Cir. 1981). It is also said that the principle of

strict construction does not mean that the narrowest possible construction must be given without concern for a manifest legislative purpose nor does it mean that common sense and the plain meaning of statutory language are to be disregarded. *United States* v. *Moore,* 423 U.S. 122, 96 S.Ct. 335, 46 L.Ed.2d 333 (1975); *United States* v. *Bass,* 404 U.S. 336, 92 S.Ct. 515, 30 L.Ed.2d 488 (1971); *United States* v. *Bramblett,* supra; *United States* v. *Brown,* 333 U.S. 18, 68 S.Ct. 376, 92 L.Ed. 442 (1948); *United States* v. *Scrimgeour,* supra; *United States* v. *Levy,* 579 F.2d 1332 (5th Cir. 1978), *cert. denied,* 440 U.S. 920, 99 S.Ct. 1243, 59 L.Ed.2d 471 (1979).

However, the present case is not one where manifest legislative intent is served by giving the words of the statute their plain and ordinary meanings. In both of the arguments the government has put forward, a rather creative interpretation of what is already a highly complex and confusing intermeshing of statutes is necessary to subject private carriers to the penal provisions of Section 11909(b). We think this situation corresponds well to the purpose and motivation behind the maxim of strict construction. As the Supreme Court has explained:

> In various ways over the years, we have stated that "when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken the language that is clear and definite." *United States* v. *Universal C.I.T. Credit Corp.,* 344 U.S. 218, 221-222 (73 S.Ct. 227, 229, 97 L.Ed. 260) (1952). This principle is founded on two policies that have long been part of our tradition. First, "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed. To make the warning fair, so far as possible the line should be clear." *McBoyle* v. *United States,* 283 U.S. 25, 27, (51 S.Ct. 340, 341, 75 L.Ed. 816)(1931)(Holmes, J.). See also *United States* v. *Cardiff,* 344 U.S. 174, (73 S.Ct. 189, 97 L.Ed. 200) (1952). Second, because of the seriousness of criminal penalties,

> and because criminal punishment usually represents the moral condemnation of the community, legislatures and not courts should define criminal activity. This policy embodies "the instinctive distaste against men languishing in prison unless the lawmaker has clearly said they should." H. Friendly, Mr. Justice Frankfurther and the Reading of Statutes, in Benchmarks 196, 209 (1967). Thus, where there is ambiguity in a criminal statute, doubts are resolved in favor of the defendant.

United States v. *Bass*, supra, at 347-48 (footnote omitted).[5]

Due to the recodification of the Interstate Commerce Act, Congress has no longer "spoken in language that is clear and definite." Even if the government's arguments about the meaning of Section 11909(b) and Section 1655(e) and (f) are plausible interpretations of these statutes in the light of Congressional intent, these interpretations cannot be accepted, for the statutes themselves do not give private carriers clear notice of the illegality of their conduct. The plain language of Section 11909(b), if anything, indicates that the conduct of private carriers is not subject to penal sanctions. Hence, based upon the considerations explained in *United States* v. *Bass*, we will apply the rule of strict construction in favor of defendant with respect to Section 11909(b) and hold that RSR, a private carrier, cannot be punished under the statute's provisions.

REVERSED.

---

[5] See also *United States* v. *Levy*, 533 F.2d 969, 973 & n.3 (5th Cir. 1976) (men of common intelligence cannot be required to guess at the meaning of a penal enactment).